Supreme Court, U.S.
FILED
APR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1189

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DOYLE A. MAYS,

Petitioner,

VS.

REYNOLDS METALS COMPANY,
A CORPORATION

Respondent.

REPLY BRIEF OF PETITIONER

Robert W. Walker
WALKER & MUSGROVE ATTORNEYS
226 West Alabama Street
Florence, Alabama 35630
(205) 764-1449

Attorney for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8

TABLE OF AUTHORITIES

	Page
Constitutional Provisions:	
Article VI of Alabama Constitution of 1901, as amended by Amendment Number 328.....	3
Cases:	
Allis-Chalmers Corp. v. Lueck, 171 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206.....	2
International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S.___, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986).....	5,6
International Longshoremen's Ass'n, AFL-CIO v. Davis, 470 So. 2d 1215 (ALA. 1985).....	5
Johnson v. Armored Transport of California, Inc., 813 F. 2d 1041 (9th Circuit 1987).....	5
Linn v. United Plant Guard Workers, 383 U.S. 553, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).....	1,2
Masonite Corp. v. International Woodworkers of America, 115 So. 2d 691, Cert. denied 89 S. Ct. 1466, 394 U.S. 974, 22 L. Ed. 2d 7 53 (1968).....	4
Powell v. Phenix Federal Savings and Loan Ass'n, 434 So. 2d 247 (ALA. 1983).....	5
Standard Oil Company v. Montecatini Edison, 342 F. Supp. 125, 129.....	3

Strachan v. Union Oil Company,
768 F. 2d 703 (5th Circuit 1985).. 1

ARGUMENT

Of the cases cited by Respondent as authority for denying review of the pre-emption issue, other than those cases previously cited by petitioner, the only case decided by a federal circuit court of appeals in which an opinion was published is the case of Strachan v. Union Oil Company, 768 F. 2d 703 (5th Circuit 1985). The Strachan case is actually authority for holding that Mays v. Reynolds is not subject to pre-emption under §301. In Strachan there was no publication of words of defamation to anyone outside the company sphere, contrary to the facts in the present case. Strachan points out:

> Even defamation claims under state law have been preempted by a grievance-arbritration procedure unless malice is shown. Linn v. United Plant Guard Workers, 383 U. S. 553, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966). There is no malice shown in this record.

The Mays case is replete with malice.

In argument the respondent claims that, "a mere allegation of malice does not warrant modification of the analysis established in Lueck and does not warrant a grant of certiorari in the present case." Mays does not simply allege malice. Malice was alleged in the original complaint filed against Reynolds and was established by jury verdict under instructions from the trial judge in line with the standards set out by this Court in Linn v. United Plant Guard Workers, Supra.

In its argument with respect to whether the Court should review the waiver issue or not, Reynolds alleges that 301 pre-emption is in the nature of subject matter jurisdiction but cites no authority. Of course there are matters in which even the state courts of

general jurisdiction do not have subject matter jurisdiction. Examples of such lack of subject matter jurisdiction are bankruptcy proceedings and NLRB proceedings. In instances where courts of general jurisdiction lack subject matter jurisdiction to adjudicate a certain class of cases, there are other courts, boards or judicial officers of some type with exclusive authority to hear issues arising out of such matters. Subject matter jurisdiction deals with the court's competence to hear a particular catagory of cases. Standard Oil Company v. Montecatini Edison, 342 F. Supp. 125, 129. Mays v. Reynolds was tried in the Circuit Court of Colbert County, Alabama, an Alabama Court of general jurisdiction, whose powers are derived from Article VII, of Alabama Constitution of 1901, as amended by Amendment Number 328.

It has been held that Congress did not intend that §301 was to displace state court jurisdiction; rather the intent was to expand jurisdiction to include federal courts Masonite Corp. v. International Woodworkers of America, 115 So. 2d 691, Cert. denied 89 S. Ct. 1466, 394 U. S. 974, 22 L. Ed. 2d 753 (1968). Section 301 cases can be tried in either state courts or federal district courts. Neither federal district courts nor state courts have subject matter jurisdiction over labor disputes in which the authority to adjudicate has been vested in the National Labor Relations Board.

The Alabama Circuit Court had subject matter jurisdiction to try defamation cases and to try §301 cases. That being the case the Alabama law with respect to affirmative defenses is set

out accurately in the cases of Powell v. Phenix Federal Savings and Loan Ass'n, 434 So. 2d 247 (ALA. 1983) and in International Longshoremen's Ass'n v. Davis, 470 So. 2d 1215 (ALA 1985). The defense of 301 pre-emption is waived if not raised at the pre-trial level.

The Respondent argues that the issue of waiver has seldom been addressed. Within the past two years, in the context of labor law, a waiver issue has been involved in the case cited by Respondent of Johnson v. Armored Transport of California, Inc. 813 F. 2d 1041 (9th Circuit 1987), and in International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U. S. ____, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986), and in the case at bar. There could be, and probably are, a number of other such cases.

In a separate opinion which concurred in part with the majority opinion, it was pointed out in International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S.____, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986):

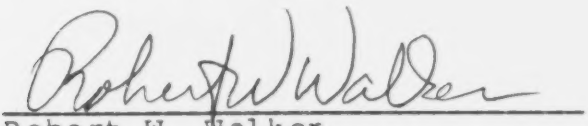
> By allowing a defendant to save its pre-emption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated such a result...

Respondent argues that petitioner included the waiver issue as an after thought, when Reynolds Metals did not even claim pre-emption until the matter was in the Alabama Supreme Court.

CONCLUSION

Petitioner submits that there are real and substantial issues and that the Court should grant the Petition for Writ of Certiorari.

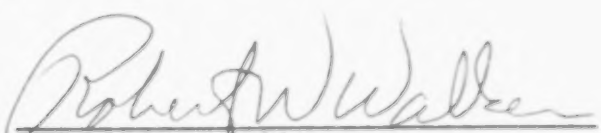
Respectfully submitted,



Robert W. Walker
Counsel of Record
WALKER & MUSGROVE
226 West Alabama Street
Florence, Alabama 35630
(205) 764-1449

CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that three copies of this reply brief of petitioner were served this 4th day of APRIL, 1988, by placing them in the United States mail, first class postage prepaid, addressed to Respondent's counsel of record, Braxton W. Ashe and J. Michael Tanner, c/o Almon, McAlister, Ashe, Baccus & Tanner, P. O. Box 899, Tuscumbia, Alabama 35674 and to John H. Morrow and Walter J. Sears, III, c/o Bradley, Arant, Rose and White, 1400 Park Place Tower, Birmingham, Alabama 35203, in accordance with Rule 28 of the rules of this Court.



Robert W. Walker